

1706900 (Migration) [2018] AATA 3690 (27 July 2018)

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DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1706900

MEMBER: Moira Brophy

DATE: 27 July 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Child (Residence) (Class BT) visa.

Statement made on 27 July 2018 at 2:37pm

CATCHWORDS

MIGRATION – Child (Residence) (Class BT) visa – Subclass 802 (Spouse) – Inconsistent employment details – Bogus documents – Employment status – Self-employed – Total or partial loss of bodily or mental function – Mental retardation since birth – Compelling circumstances – Sibling's interests – Convenience of care for applicant – Decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65

Migration Regulations 1994 (Cth), Schedule 2 cl 802.223, Schedule 4 PIC4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

4. ISSUE

5. The issue in the present case is whether the first named visa applicant, [Mr A] meets Public Interest Criterion 4020 (PIC 4020) as required by cl.802.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) for the grant of the visa.

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 23 March 2017 to refuse to grant the applicant a Child (Residence) (Class BT) visa under s.65 of the *Migration Act 1958* (the Act).
7. The applicant applied for the visa on 13 December 2012. The delegate refused to grant the visa on the basis that the applicant did not satisfy the Public Interest Criterion 4020 (PIC 4020) requirements of cl.802.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because employment details provided in a previous Tourist (Subclass FA 600) application were not consistent with the details provided in this application.
8. The applicant [appeared] before the Tribunal on 18 May 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the parents of the visa [applicant].
9. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

11. BACKGROUND

12. [Mr A] is a [age]-year-old who was born [in] Papua New Guinea. He lodged an application for a Child (Residence)(Class BT)(Subclass 802 Child Visa on 15 August 2016 on the grounds of being the dependent child of the [sponsor]. [Mr A] claims to be the dependent child of the sponsor because he is not able to support himself because of a total or partial loss of his bodily or mental functions.
13. [Mr A] grew up in Papua New Guinea. His parents have resided in Australia for the past 13 years and [Mr A] has spent considerable time in Australia visiting his parents. The remainder of the time he lived in the family home in Papua New Guinea. At the time of making this application he was in Australia visiting his parents on a Visitor (Class FA) Subclass 600 visa.
14. On 12 January 2017 the Department wrote to [Mr A] inviting him to comment on information that he had provided, or caused to be provided a bogus document or false and misleading information in relation to his visa application and that as a result he may fail to satisfy PIC 4020(1). The information provided was that in an electronic application for a Tourist Visa class granted on 29 September 2015 [Mr A] had advised he was self-employed in Papua New Guinea in [details deleted]. At the time [Mr A] advised as a result of his employment he would be self-funded during his stay in Australia. In his present application for an 802 visa [Mr A] stated he was not able to work because of his total or partial loss of bodily or mental function.
15. [Mr A] responded on 8 February 2017 in the form of a submission, account transaction statements for the applicant's bank account, account transaction statements for [another person's] account plus a statutory declaration dated [in] February 2017 from her, and a statutory declaration from [Mr A's] father dated [in] February 2017.
16. In the Decision Record, a copy of which [Mr A's] migration agent has provided to the Tribunal, the delegate acknowledged [Mr A's] response to the adverse information outlined above. The delegate considered the evidence presented and was satisfied the applicant had provided false and misleading information, but was not satisfied that compelling circumstances exist to warrant a waiver. Consequently, the delegate was not satisfied that the applicant met the waiver requirements of PIC 4020(4).

17. The Tribunal extended time after the hearing for the applicant to provide any additional material he wished to rely on in response to matters raised at the hearing. A further submission was received on 20 June 2018 and has been considered by the Tribunal in the decision making.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. Public Interest Criterion 4020 (PIC 4020) as required by cl.802.223 for the grant of the visa, broadly speaking, requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
19. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

20. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
21. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
22. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was

aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

23. The Tribunal is satisfied that the applicant provided information with his application that may be considered to be false and misleading. In making this finding the Tribunal has considered the materials contained in the department file, the evidence given at the time of hearing and materials provided to the Tribunal.
24. At the time of hearing [Mr A] told the Tribunal he had previously been [details deleted]. He had been doing that when he had been residing in Papua New Guinea but he no longer does that as his family gives him money if he needs it. His evidence was corroborative of his earlier statements in his application for a Visitor (class FA)(Subclass 600) visa. In that application in answer to a question as to whether he was presently employed [Mr A] answered that he was 'self-employed in [details deleted].' He went on to say his stay in Australia would be self-funded.
25. PIC 4020 is directed at information which is false, in the sense of purposely untrue, rather than information which lacks the necessary element of fraud or deception (e.g. in the case of an innocent or unintended mistake).
26. In order to be misleading, the Court in *Kaur v MIMAC*¹ held that the conduct in question must convey or contain a misrepresentation. Such a view is consistent with the interpretation of false or misleading representations about goods or services under the Australian Consumer Law. The representation may be about an existing state of facts or a future state of affairs such as in circumstances where an applicant must satisfy a criterion with a prospective aspect. For example, the Court in *Kaur v MIBP* observed that the nature of cl.572.223(2)(c), which requires the Minister to be satisfied that an applicant *will have access* to certain funds, requires that the information must form a type of representation as to a future state of affairs.
27. The Tribunal considers it to be a reasonable inference from the answers given at the time of application that information was given to convey an impression the applicant for the visa was able to self-fund his proposed visit.
28. In his application for an 802 visa it is stated the applicant is not currently employed and relies on a medical report that he has a disability which prevents him from working. A report from [a doctor] dated [in] July 2011 states that [Mr A's] impairment of 'mental retardation' has been present from birth and that 'he has been unable to find work and support himself. He has been totally dependent on his family for his basic needs.'
29. The Tribunal accepts this assessment has been provided by a person qualified to give that assessment.
30. The Tribunal makes no findings as to whether the activity described by the applicant at the time of hearing and referred to in his Visitor application meets the definition of 'work' in section 245AG of the Migration Act. The fact is there are two conflicting statements of fact provided to the Tribunal. One is to the effect the applicant was previously employed and one to the effect that because of a disability the applicant is prevented from working and has been since birth.
31. The Explanatory Statement to SLI 2011, No.13 which introduced PIC 4020 states that it was intended that the term 'information that is false or misleading in a material particular' will capture any information which is false or misleading that the applicant provides if it is relevant to the purpose for which it is made, namely the purpose being the assessment of

the applicant against any of the criteria for the grant of the visa for which he or she has applied, or a visa that the applicant held in the 12 months before the application was made.

32. The Tribunal is satisfied that [Mr A] provided information that was false or misleading in a material particular on his Visitor visa application in that he gave evidence indicative of his being able to self-fund his travel and that he held that visa in the 12 months before the present application for an 802 visa was made. The Tribunal is further satisfied that information that the applicant was able to self-fund his proposed visit was provided in an attempt to obtain a migration outcome.
33. Since the Tribunal is satisfied the information provided is 'false and misleading in a material particular' the Tribunal finds the applicant does not meet cl.4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

34. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
35. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
36. The Explanatory Statement states that it is intended that the granting of the waiver relates solely to compelling circumstances affecting Australia's interests, or the compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, not the interests of the visa applicant. The types of circumstances that may involve compelling or compassionate reasons for waiving the requirements of PIC 4020 include:
 - Family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);
 - That family members in Australia would be left without financial or emotional support; and
 - A parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and would therefore be subject to an exclusion period).
37. The Tribunal is required to consider all the circumstances of the case including any matters put forward by an applicant, and determine on the evidence as a whole whether there are compelling and/or compassionate circumstances justifying the granting of the visa.
38. The parents of [Mr A] are Australian permanent residents as are three of his siblings. The claim is that there should be a waiver of the requirements because there are compassionate or compelling circumstances affecting their interests.

39. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
40. [Mr A's] parents live in [City 1, Australia]. His father is [Occupation 1] for PNG so the majority of his time is spent in PNG. [Mr A] said he often visits his parents' home to have dinner with them.
41. [Mr A] told the Tribunal he was currently staying at his brother's house in [City 1, Australia]. His brother is away from home frequently as he is [Occupation 1] based in PNG and his wife commutes between PNG and [City 1, Australia]. When they are away [Mr A] stays alone. He has been at his brother's house for the past two years. He has not lived at any other house in [City 1, Australia]. He has another brother in [City 1, Australia] who is also [Occupation 1] based in PNG. His wife and [children] are resident in [City 1, Australia]. [Mr A] told the Tribunal he assists his sister in law in the care of the children. He often picks them up and drops them off at school. His other sister who has permanent residency stays with friends in [City 1, Australia] when she is there. She is also [Occupation 1] for [a PNG company].
42. The Tribunal was satisfied [Mr A] was a member of a large and supportive family who were finely attuned to his specific needs. On the evidence before the Tribunal he participated in the life of the family and provided assistance to his brother's children. The Tribunal does not doubt the family consider they would be better placed to look out for [Mr A's] needs if he were physically with them in Australia.
43. The Tribunal was mindful that at the time [Mr A's] parents applied to migrate to Australia [Mr A] was declared as a non-migrating child. On the available evidence the situation as to the applicant's impairment and the impact on his functionality has not changed since that time. While the Tribunal appreciates it would assist the family if [Mr A] was in Australia permanently it is difficult for them to rely on a circumstance that was well known to them at the time they chose to live in Australia with [Mr A] remaining in Papua New Guinea.
44. The Tribunal is satisfied there are no compelling circumstances that affect the interests of Australia.
45. After considering all of the evidence before it the Tribunal is not satisfied that there are any circumstances in this case that affect an Australian citizen, Australian permanent resident or eligible New Zealand citizen, either on an individual or cumulative basis, that are sufficient to justify the waiver of PIC 4020 and the grant of a Subclass 802 visa to the applicant.
46. Therefore the requirements of cl.4020(1) should not be waived.

DECISION

47. The Tribunal affirms the decision not to grant the applicant a Child (Residence) (Class BT) visa.

Moirá Brophy
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...